

**BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD**

In the Matter Between

{Grievant}  
Grievant

Record of Proceedings  
FSGB No. 2007-011

And

Date: November 5, 2007

Department of State

**DECISION  
EXCISION**

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For the Foreign Service Grievance Board:

Presiding Member:

Harriet Davidson

Board Members:

Harlan F. Rosacker  
Jeanne L. Schulz

Special Assistant:

Joseph Pastic

Representative for the Grievant:

Zlatana Badrich, Esq.  
American Foreign Service Association

Representative for the Department:

Joanne M. Lishman, Esq.  
Director, Grievance Staff

Employee Exclusive Representative:

American Foreign Service Association

## CASE SUMMARY

**HELD:** The Department established that disciplinary action was justified since grievant admitted to numerous incidents of engaging prostitutes, while stationed overseas. There was a nexus between grievant's off-duty misconduct and the efficiency of the Service. The Department properly considered all of the *Douglas* factors, and the penalty is appropriate under the circumstances.

## OVERVIEW

Grievant appealed the agency's denial of his grievance contesting a three-day suspension without pay for improper personal conduct. He believed the agency failed to properly consider mitigating factors and prove that the penalty was proportionate to the offense. As remedy he requested: mitigation of the penalty; either the imposition of the full suspension without placing the decision letter in his Official Performance File (OPF) or the revision of the letter to refer to inappropriate conduct rather than explicitly describing his offense.

In a routine security clearance update interview grievant volunteered the information forming the basis of the charge against him - over a seven-year period he engaged the services of prostitutes 30-40 times in {post 2}, where it is a crime, and 10-20 times in {post 1}. The Department identified as an aggravating factor that the misconduct could have caused embarrassment and damaged U.S. interests had grievant been arrested.

Grievant claimed there was no nexus between his off-duty misconduct and professional work. In mitigation, grievant cited various stresses in his personal and professional life. However, his work did not suffer and he had a long history of excellent work with no prior disciplinary action. Grievant fears further shame and embarrassment if his offense is described explicitly in a decision letter placed in his performance file. He claims that his penalty is inconsistent with the letter of admonishment to another employee who was arrested and convicted for a similar offense.

The Board found that the agency had met its burden of proof and had properly considered the *Douglas* factors. The Department is not required to demonstrate a specific impact on job performance or service efficiency before taking action; proof that off duty misconduct conflicted with the agency's mission is sufficient. Because Foreign Service officers are considered to be on duty 24 hours a day while overseas and are expected to maintain the highest standards of conduct, there is a nexus between off-duty conduct and the efficiency of the Service.

The Board found that differences between the other employee's and grievant's offenses warranted a heavier penalty in grievant's case. His three-day suspension is well within the Department's range of penalties. Department regulations do not permit the Board discretion to grant either of grievant's requests regarding not placing the discipline letter in his OPF or a softening of its language.

The grievance appeal was denied.

## **DECISION**

### **I. THE GRIEVANCE**

{Grievant}, a Foreign Service officer with the Department of State (Department, agency), appeals the denial of his agency-level grievance contesting a three-day suspension without pay for improper personal conduct. {Grievant} believes that the Department failed to adequately consider mitigating factors and prove the penalty is proportionate to the offense. He requested and received interim relief during the pendency of this appeal. As a remedy, he seeks: mitigation of the penalty; either the imposition of the full suspension without placing the decision letter in his Official Performance File (OPF) or the revision of the letter to refer to inappropriate conduct rather than explicitly describing his offense; and any other relief deemed just and proper.

### **II. BACKGROUND**

In a letter dated October 12, {year}, the Department notified {Grievant} of its proposal to suspend him for three calendar days without pay based on a Diplomatic Security (DS) memorandum concerning his improper personal conduct:

Charge: Improper Personal Conduct in Violation of 3 FAM 4139.8 and 14

In an interview with a DS investigator on August 23, 2004, you stated that you had engaged in “short term relationships” while assigned to {post 2} and {post 1}. You admitted that these relationships were with prostitutes.

Specification 1

You had 30 to 40 such encounters in {post 2} over a four-year period and that [sic] you paid between \$30 and \$40 per session. According to {post 2} law, it is illegal to purchase sex.

## Specification 2

You had about 10 to 20 such encounters in {post 1} over a three-year period.

## Aggravating Factors

Your criminal misconduct could have caused embarrassment to the [USG] and damaged U.S. interest [sic] had you been arrested for purchasing sex with prostitutes in {post 2}. Your behavior in {post 1}, although not criminal under local law, was unbefitting a Foreign Service Officer representing the [USG]. Moreover, you were married at the time of these encounters and only told your wife of your actions a few months before your interview in August {year}. By not telling your wife, you left yourself vulnerable to blackmail from hostile entities, putting U.S. interests at risk.

{Grievant} responded in a November 22, {year} letter noting that he had voluntarily reported the encounters and acknowledging that his behavior did not reflect the way a diplomat should act. In looking back, he was still confused and depressed about why he acted in a morally repugnant manner. He delineated mitigating factors that he believed should reduce the severity or impact of the proposal. He responded orally on March 21, {year}.

In a decision letter dated April 4, {year}, the deciding official noted the mitigating factors that {Grievant} voluntarily reported his conduct, understood the seriousness of his actions and had not been disciplined previously. However, he found as aggravating factors that being arrested in {post 2} for the criminal offense of purchasing sex could have caused embarrassment and damaged United States (U.S.) interests there and that his conduct in {post 1} was “unbefitting a Foreign Service Officer.”

{Grievant} filed a grievance with the Department on May 2, {year}, questioning whether the proposed penalty was proportionate to the offense and repeating the substance of earlier submissions, including his request to either keep the discipline letter

out of his OPF or revise the language of the letter. In its decision dated March 16, 2007, the agency affirmed the three-day suspension, and noted that its regulations did not permit the granting of either of grievant's requests.

Grievant appealed to this Board on March 30, 2007. He submitted a supplemental submission on May 24, the Department responded on June 13, and grievant submitted a rebuttal on June 28. The Record of Proceeding was closed on September 6, 2007.

### **III. POSITIONS OF THE PARTIES**

#### **The Grievant**

While {Grievant} admits to the charge and specifications, he offers in mitigation that his father's unexpected death in October 1997 had been a major blow to him. Then, his wife left the following month for the U.S. to give birth to their second child and did not return to {post 1} until March 1998. He was depressed and unhappy about his job and twice visited prostitutes. Afterwards he met with the Embassy's regional psychiatrist to address these issues. After his wife returned, their marriage became increasingly unhappy and grievant's visits to prostitutes resumed.

He had hoped to break the cycle upon arriving in {post 1} mid-2000, but eventually he resumed visiting prostitutes. His marriage continued to deteriorate, and he had a stressful job with long hours and a difficult relationship with his supervisor. He was on medication for depression during his last year in {post 2}. Contrary to the proposal letter's implication, had anyone ever tried to compromise him, he would have taken the necessary steps to avoid that situation.

Grievant's work did not suffer during the years in question: he received two Superior Honor Awards and an honorable mention for the Salzman Award for

outstanding performance by an Economic Officer. He has over 20 years in the Foreign Service, with every overseas posting a hardship post. Moreover, there is no nexus between his off-duty conduct and professional work.

{Grievant} sees no purpose for having the three-day suspension letter, detailing the nature of his offense, placed into his OPF other than to cause him further shame and embarrassment. He fears that people he knows well and sees frequently will serve on his promotion panel and see the specifics of the charges.

Unlike a letter of reprimand, a three-day suspension remains in one's OPF for two years or two promotion board reviews in a very competitive environment. Further, the Department has provided no evidence to support the deciding official's statement that he did not believe that "a lesser sanction would promote the efficiency of the service." This is not a simple disagreement; and the Department bears the burden of proof. Grievant's mitigating factors - length of service, absence of prior discipline, personal surrounding circumstances - have not been adequately assessed and credited. The Department has provided no information on cases it analyzed to support its conclusion that the penalty in his case is consistent with those of similar offenses.

Grievant is aware of only one case similar to his in the past four years. The employee in that case was charged with "off-duty misconduct - prostitution" and received only a letter of admonishment. This contradicts the deciding official's determination that grievant's penalty was proportionate to other similar cases. The other employee was arrested, charged and convicted. While grievant engaged a number of prostitutes, his activities remained private and he was never arrested or charged with a crime. An actual arrest and conviction has a higher potential for embarrassment than grievant's situation.

The Department's attempt to distinguish between "off-duty hours" in the U.S. and overseas and to impose a heavier penalty in his case ignores the deciding official's determination that there was "no notoriety" associated with grievant's off-duty offenses - offenses which he voluntarily admitted. Yet it finds the potential for embarrassment an aggravating factor. In contrast, the 2003 case was public and notorious due to the arrest and conviction involved, and the "potential" for embarrassment was already present.

Grievant cites FSGB Case No. 2004-062 (August 26, 2005), in which the Board held that a two or three-day suspension for four security infractions was disproportionate to lesser penalties imposed by the Department in similar cases for the same type infractions. In that case the Board mitigated the penalty to one day, and in grievant's case it should also find his three-day suspension outside the reasonableness envisioned by the Board.

### **The Department**

The record demonstrates that the deciding official considered all of the *Douglas* factors including: grievant's more than 20 years of excellent work with no prior disciplinary action, the awards he received, the regret he expressed, and his personal stress from marital difficulties and the death of his father. He correctly concluded that a three-day suspension was appropriate, in view of the aggravating factor that prostitution is a crime in {post 2} and that {Grievant}'s criminal conduct on 30-40 occasions posed the potential for embarrassing the government and damaging U.S. interests.

The 2003 case cited by grievant is not a "like case" and provides no basis for reducing grievant's penalty. In that case, during a periodic security clearance update investigation, the "employee revealed that in March 2000 he had been arrested and



charged with a single off-duty instance of engaging a prostitute, lewdness, and assignation while posted to a city in the United States.” The employee was found guilty of engaging a prostitute and fined \$350. After completion of the DS investigation and about three years after the conviction, the employee received a letter of admonishment indicating that had this conduct occurred while the employee was serving overseas, disciplinary action would have been imposed.

One instance of engaging a prostitute in the U.S. is different than 40 to 60 instances of the same in countries overseas, where officers know they are considered to be on duty 24 hours a day. A suspension without pay is consistent with Department policy, and grievant has failed to demonstrate that the 2003 case is a “like case” or that a three-day suspension lacks consistency. The Department is not aware of any other case involving so many incidents of hiring prostitutes, especially in a country where to do so is a crime. A three-day suspension is well within the bounds of reasonableness envisioned in Board decisions.

#### **IV. DISCUSSION AND FINDINGS**

In all grievances concerning disciplinary actions, the Department has the burden of establishing by a preponderance of the evidence that the disciplinary action is justified.<sup>1</sup> The Department must prove that the grievant committed the infractions for which he is charged, there is a nexus between those acts and the efficiency of the Service, and the proposed penalty is appropriate in the circumstances. For the reasons discussed below, the Board finds the record establishes that the Department has met its burden of proof.

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<sup>1</sup> 22 CFR 905.2.

The relevant facts are not in dispute. Grievant volunteered the information forming the basis of the charge against him. He had approximately 10 -20 encounters with prostitutes over a three-year period while serving in {post 1}, and frequented prostitutes on 30-40 occasions over a four-year period while serving in {post 2}, where such conduct is illegal. Thus, the Department has sustained its burden of proving the charges against grievant.

Grievant takes too narrow a view in arguing that there is no nexus between grievant's off-duty conduct and his professional work. The agency is not required to demonstrate a specific impact on job performance or service efficiency before taking action. Demonstrating that off-duty misconduct conflicted with the agency's mission is sufficient. *See* FSGB Case No. 2003-045 (March 8, 2004), citing *Kruger v. Department of Justice*, 32 MSPR 71 (1987). In *Kruger*, the MSPB sustained the agency's taking disciplinary action against employees who had been observed smoking marijuana off duty, finding that their misconduct adversely affected the agency's mission. Evidence of employees' satisfactory performance before and after the misconduct and the lack of evidence showing that their misconduct was publicized or a matter of notoriety, did not rebut the inference arising from the relation between misconduct and the agency's mission.

The fact that Foreign Service Officers are considered to be on duty 24 hours a day while overseas and are expected to maintain the highest of standards of conduct broadens the range of off duty conduct that may be considered when determining nexus to the efficiency of the Service. Criminal misconduct engaged in by an American diplomat

overseas while in off-duty status is virtually indistinguishable from the same conduct during duty hours in terms of potential for embarrassment and damage to U.S. interests.

This Board has ruled that it will not normally displace the Department's determination in discipline matters and "deference is to be given to the agency's judgment unless the penalty is so harsh and unconsciously [sic] disproportionate to the offense that it amounts to an abuse of discretion." FSGB Case No. 2002-034 (February 24, 2004). We find that the penalty imposed was appropriate under the circumstances of this case and that it does not constitute an abuse of discretion.

We find that the deciding official properly considered the relevant factors as indicated on the *Douglas* factors check list, including grievant's personal circumstances, in reaching his decision. Under the nature and seriousness of the offense and its relationship to the employee's duties, he noted that the penalty for prostitution in {post 2} is imprisonment for no less than three months and no more than three years. Had grievant been arrested, his actions could have caused embarrassment to the government and damage to U.S. interests. The deciding official further found that: grievant's actions were intentional; his contact with the public was not particularly prominent; he had had no prior disciplinary action taken against him; his work performance was excellent and he had received several awards. There was no notoriety associated with his misconduct, which occurred overseas during off-duty hours.

The deciding official specifically listed as a mitigating factor that the death of grievant's father and marital difficulties contributed to his actions. We find that the deciding official fairly balanced the mitigating and aggravating factors when he concluded no lesser penalty would be appropriate to the misconduct established.

Grievant also claims that the penalty imposed violates the precepts of like penalties for similar offenses. 3 FAM 4374 (1) and (2) provide:

- (1) The disciplinary action taken should be consistent with the precept of like penalties for similar offenses with mitigating or aggravating circumstances taken into consideration. Whether or not offenses are alike will be based on the similarity of the underlying conduct rather than how the charge is worded. The action taken should be fair and equitable; and if a penalty is warranted, it should be no more severe than sound judgment indicates is required to correct the situation and maintain discipline. . . . It is entirely possible, however, that an objective review of all facts and circumstances in a given case will indicate that a greater penalty, a less severe penalty, or no penalty should be recommended, as appropriate to obtain the general objective stated above;
- (2) In determining what action should be taken, it should be established whether the employee knew, or could reasonably be expected to know, what standards of conduct or performance was expected of him or her. However, at a minimum, employees must understand that federal employees are expected to abide by the law, the Department's regulations, and common sense standards of conduct;

...

Grievant argues that because he was never arrested or convicted, he warrants the same level of discipline, a letter of admonishment, that was given to the Foreign Service employee convicted and fined for engaging a prostitute. This offense occurred off-duty while the employee was serving in the U.S. We agree with the agency that it may be appropriate to take disciplinary action for offenses committed overseas when it might not do so for similar offenses in the United States or to impose heavier penalties for conduct overseas. The agency noted in its letter of admonishment to the other employee: "Had this conduct occurred while serving at an overseas post, disciplinary action would have been proposed in lieu of this Admonishment because you are considered to be on duty 24

hours a day.” We also agree that there is a significant difference between one incident of engaging a prostitute and 40 to 60 incidents.

In view of the number of acts of misconduct involved, an extent without parallel in the agency’s disciplinary records, we find that a three-day suspension without pay is within the range of reasonable penalties. FSGB Case No. 2004-062, cited by grievant to support his claim of disparate penalty, is not applicable. In that case, the Board found that the agency had not offered reasonable grounds for imposing a more severe penalty than provided for in its SOP, “Guidance for Security Infractions.” There are no SOP guidelines involved in {Grievant’s} case. The schedule of penalties in 3 FAM 4377 specifies that the penalty for general personal misconduct, including immoral, indecent, unethical, criminal, infamous, dishonest, or notoriously disgraceful conduct, will generally fall within the range of a Letter of Reprimand to Removal. Grievant’s three-day suspension is well within the stated range of penalties.

Grievant also contends that the description of his offense in the disciplinary decision letter is unnecessarily explicit and requests the Board either to order that the letter not be placed in his performance file or to revise it to refer only to “inappropriate conduct.” We find that granting either form of relief would be inconsistent with the Department’s regulations. 3 FAM 4353 (1) provides that a proposal to suspend an employee shall include reasons, as specific as possible to guarantee due process and permit the employee to understand the allegations and respond appropriately. According to 3 FAM 4355(b)(1), if the deciding official sustains the proposal, the decision letter shall “[i]dentify the specific charges in the proposal for suspension that have been sustained.” Once the letter is issued, 3 FAM 4355(d) provides that a copy of it be placed

in the employee's OPF to remain for a period of two years or until it is reviewed (in this case) by two promotion boards reviewing files for two years.

## **V. DECISION**

The grievance appeal is denied.